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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-

RICHARD TUCKER, JR.,

Petitioner,

v.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

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TABLE OF CONTENTS

Table of Authorities.....ii, iii

Citations to Opinions Below.....1

Jurisdiction.....2

Constitutional and Statutory Provisions Involved.....2

Questions Presented.....2, 3

How the Issues Were Raised Below.....3

Statement of the Case.....4

Reasons for Granting the Writ.....5

Petitioner was denied his right to a fair trial, right to a reliable, nonarbitrary sentencing procedure, and right to due process of law as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States by prejudicial and inflamatory arguments, wholly unsupported by the evidence, made by the prosecutor at the penalty phase of Petitioner's bifurcated capital trial.....5

The prosecutor's comment on Petitioner's exercise of his right not to testify violated Petitioner's right against self-incrimination, right to a fair trial, right to a reliable, nonarbitrary sentencing determination, and the right to due process of law as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.....10

TABLE OF AUTHORITIES

Cases

Berger v. United States, 295 U.S. 78 (1934).....6

Doyle v. Ohio, 426 U.S. 610 (1976).....11

Eddings v. Oklahoma, 50 U.S.L.W. 4161 (1982).....7, 9

Griffin v. California, 380 U.S. 609 (1964).....11

Grunewald v. United States, 353 U.S. 391 (1957).....11

Harris v. United States, 402 F. 2d 656 (D.C. Cir. 1968)....7

Lockett v. Ohio, 438 U.S. 586 (1978).....11

McGautha v. California, 402 U.S. 193 (1971).....8, 9

Miller v. Pate, 386 U.S. [illegible] (1967).....6, 7

Pointers v. Texas, 380 U.S. 400 (1964).....8

Tucker v. Georgia, 442 U.S. 891 (1980).....4

Tucker v. State, 245 Ga. 68, 263 S.E. 2d 109 (1980).....4

United States v. Bess, 593 F. 2d 749 (6th Cir. 1979).....7

United States v. Gonzales Vargas
558 F. 2d 63 (1st Cir. 1977).....7

Constitutional Amendments

Fifth.....2, 3, 10

Sixth.....2, 3, 5, 10

Eighth.....2, 3, 5, 7, 10, 11, 12

Fourteenth.....2, 3, 5, 6, 10, 11, 12

Statutes

28 U.S.C. §1257.....2

Georgia Code Ann. §24-4526.....2

Georgia Code Ann. §26-1101.....2, 8

Georgia Code Ann. §26-1311.....2

Georgia Code Ann. §26-3102.....2

Georgia Code Ann. §27-2524.1.....2, 11

Georgia Code Ann. §50-127.....2

Other Authority

ABA Standards, The Prosecution Function §5.8.....6, 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-

RICHARD TUCKER, JR.,

Petitioner,

v.

WALTER D. ZANT, Warden,
Georgia Diagnostic Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

Petitioner, Richard Tucker, Jr., prays that a writ of certiorari be issued to review the judgements of the Superior Court of Butts County, Georgia entered on September 11, 1981 and January 29, 1982. Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia March 24, 1982.

CITATIONS TO OPINIONS BELOW

Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia on March 24, 1982. The order of the Supreme Court of Georgia and the unreported opinions of the Superior Court of Butts County are set out in Appendices A, B, and C respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C §1257 (3), petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

Discretionary review of the judgements of the Superior Court of Butts County was sought in the Supreme Court of Georgia pursuant to Ga. Code Ann. §24-4526. Review was denied March 24, 1982. Pursuant to Rule 20 of the Rules of the Supreme Court, the time for this petition runs from the denial of review issued by the Supreme Court of Georgia on March 24, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia, the texts of which are set out in Appendix D hereto:

Georgia Code Ann. §24-4526

Georgia Code Ann. §26-1101

Georgia Code Ann. §26-1311

Georgia Code Ann. §26-3102

Georgia Code Ann. §27-2534.1

Georgia Code Ann. §50-127

QUESTIONS PRESENTED

-1-

Whether Petitioner was denied his right to a fair trial, right to a relieable, nonarbitrary sentencing procedure, and right to due process of law as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to Constitution of the United

States by prejudicial and inflamatory arguments, wholly unsupported by the evidence, made by the prosecutor at the penalty phase of Petitioner's bifurcated capital trial.

-2-

Whether Petitioner was denied his right against self-incrimination, right to a fair trial, right to a reliable, nonarbitrary sentencing determination and the right to due process of law as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States by the prosecutor's comment on Petitioner's exercise of his right not to testify during the guilt/innocence phase of his bifurcated capital trial.

HOW THE ISSUES WERE RAISED BELOW

Petitioner's state Petitions for Writ of Habeas Corpus filed in the Superior Court of Butts County, Georgia pursuant to Ga. Code Ann.§50-127 raised the Constitutional issues involved in the questions presented. The habeas corpus court denied the petitions. The constitutional issues were raised again on application for certificate of probable cause to appeal in the Supreme Court of Georgia which denied the application.

STATEMENT OF THE CASE

On January 12, 1979 Petitioner was convicted and sentenced to two death penalties in the Superior Court of Bibb County for kidnapping and murder. The judgements and sentences were affirmed by the Georgia Supreme Court in Tucker v. State, 245 Ga. 68, 263 S.E. 2d 109 (1980). Certiorari was denied by this Court. Tucker v. Georgia, 449 U.S. 891 (1980).

On March 27, 1981, Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia. The petition was denied on September 11, 1981 (Appendix B). Subsequently, petitioner was permitted to file a second Petition for Writ of Habeas Corpus in the Superior Court of Butts County which was denied January 29, 1982 (Appendix C). A consolidated application for certificate of probable cause to appeal from the habeas corpus decisions was denied by the Georgia Supreme Court March 24, 1982 (Appendix A).

REASONS FOR GRANTING THE WRIT

I

PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL, RIGHT TO A RELIABLE, NONARBITRARY SENTENCING PROCEDURE, AND RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY PREJUDICIAL AND INFLAMATORY ARGUMENTS, WHOLLY UNSUPPORTED BY THE EVIDENCE, MADE BY THE PROSECUTOR AT THE PENALTY PHASE OF PETITIONER'S BIFURCATED CAPITAL TRIAL.

At the penalty phase of Petitioner's trial the prosecutor's arguments appealed to the passion and prejudice of the jury, misstated facts in evidence, refered to facts nowhere in evidence, contained the prosecutor's personal opinions, and contained other prejudicial and inflamatory statements.

Petitioner is a Black man. He was charged in Bibb County, Georgia with the murder of an elderly White woman. Petitioner was not charged with rape, and there was no evidence of rape offered at the trial. The prosecutor did not assert that petitioner committed rape until the penalty phase of petitioner's murder trial, at which time, with the aim of inflaming the passions of the jury, he said;

> I hate to say this with the family sitting in the courtroom because I know they don't want to believe this; they don't want to believe the type of punishment that this defendant imposed on their mother or their wife - but I think in your own mind you should be settled now by knowing that this man is a rapist and a murderer, that he forced Mrs. Sandefur to commit acts of oral sodomy on him and that he committed the offense of rape. (T Trial 893)

The prosecutor's inventive and unsupported assertion that Petitioner had forced the woman to commit oral sodomy on him and raped her helped provoke the jury to recommend a sentence of death. His argument was both unethical and unconstitutional. The ABA Standards on the Prosecution Function read:

> 5.8 Argument to the Jury
>
> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not use arguments calculated to inflame the passions and prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under controlling law, or by making predictions of the consequences of the jury's verdict.
>
> ABA Standards; The Prosecution Function §5.8

As this Court stated many years ago in Berger v. United States, 295 U.S. 78 (1934), the prosecutor must be held to a high standard of conduct. His interest in justice must come before his zeal to win his case; "while he may strike hard blows, he is not at liberty to strike foul ones." Supra, p. 88. The Court went on:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. Supra, p. 88.

No matter what the exact constitutional limits on the prosecutor's behavior are, certainly a prosecutor cannot invent or fabricate evidence or lie while arguing the case of the state. "[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." Miller

v. Pate, 386 U.S. 1, 7 (1967).

Narrow limits to prosecutorial behavior are especially necessary in a capital sentencing procedure in which there is a compelling public interest in ensuring the actual and apparent fairness of the outcome. The prosecutor's wild and unsupported allegations in his sentencing phase argument served only to enrage the jury, and ran directly contrary to this Court's stated objective for death penalty procedures.

> [T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is aforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake. Eddings v. Oklahoma, 50 U.S.L.W. 4161, 4165 (1982) (O'Conner, J., Concurring).

To permit improper argument in the sentencing phase of a captial trial conflicts not only with the standards of due process, but also with the Eighth Amendment's requirement of reliability in capital sentencing.

In his closing argument to the jury in the sentencing phase the prosecutor recited personal opinions. The personal opinions of the prosecutor are irrelevant, and as they may appear to imply information not admitted into evidence, federal courts consistently have found reversible error when a prosecutor asserts his belief concerning the proper disposition of the case. United States v. Bess, 593 F. 2d 749 (6th Cir. 1979), United States v. Gonzales Vargas, 558 F. 2d 631 (1st Cir. 1977), Harris v. United States, 402 F. 2d 656 (D.C. Cir. 1968) (Burger, J.).

Several times the prosecutor said that if Petitioner received a life sentence Petitioner would kill again. (T Trial 896 - 901). He refered to individual jurors by name, and told them repeatedly that if Petitioner was not sentenced to death his next murder would be on their conscience. (T Trial 895 - 902).

The prosecutor called Petitioner "less than human," and said "he is not somebody in our society that we can afford to keep." (T Trial 896). These statements represent an indefensible appeal to the passions and prejudices of the jury.

The prosecutor recounted to the jury personal experiences. He told the jury that he had written personally to the Board of Pardons and Paroles to try to prevent Petitioner from being paroled for a prior offense. (T Trial 900).

He described to the jury his experiences the day he was called to the crime scene. "I looked at the necklace of maggots, I smelled the smells. I knew that some day in the not-too-distant future I'd be standing there."(T Trial 900).

The prosecutor was not a witness in this case. Though the jury was likely to respond to his stories as it would respond to testimony, Petitioner did not have the opportunity to confront and cross-examine him.

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their belief that the right to confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Pointers v. Texas, 380 U.S. 400, 405 (1964).

Several times the prosecutor said that Petitioner would be paroled if he received a life sentence. (T Trial 736, 749). These statements were in violation of Ga. Code Ann. §26-1101, and in violation of the ABA standards of Conduct. ABA Standards, The Prosecution Function §5.8(d). Significantly, this argument placed before the jury a misleading assertion on an issue that could only distract the jury from its delegated task.

After providing the jury with all these prejudicial arguments, the prosecutor emphasized that the jury would not be responsible for the Petitioner's death if it voted for the death penalty. (T Trial 769-70). This argument is a complete aboutface

from this Court's hope, stated in McGautha v. California, 402 U.S. 193 (1971), that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human being will act with due regard for the consequences of their decision." Supra p. 208.

Over the years American courts and legislatures have struggled "to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." Eddings v. Oklahoma, 50 U.S.L.W. 4161, 4163 (1982). The excesses of the prosecutor in the sentencing phase of Petitioner's trial denied Petitioner even the semblance of a rational hearing on the question of life or death.

II

THE PROSECUTOR'S COMMENT ON PETITIONER'S EXERCISE OF HIS RIGHT NOT TO TESTIFY VIOLATED PETITIONER'S RIGHT AGAINST SELF-INCRIMINATION, RIGHT TO A FAIR TRIAL, RIGHT TO A RELIABLE, NONARBITRARY SENTENCING DETERMINATION, AND THE RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner did not take the stand during the guilt/innocence phase of his bifurcated capital trial. He indicated to the court that he would take the stand during the sentencing phase. (T Trial 722). Defense counsel submitted a request to charge on defendant's election not to testify, but the trial court did not include the charge in instructions to the jury. (T Trial, 781).

Petitioner did testify in his own behalf during the sentencing phase. In his testimony, offered as evidence of mitigating circumstances to his crime, Petitioner explained what he considered his relatively minor role in the crime compared to the roles of others not charged.

The prosecutor argued in his closing argument in the sentencing phase that Petitioner had had an ulterior motive in his failure to testify during the guilt/innocence phase of the trial.

> Well, why then did this defendant all of a sudden in this stage of the trial get on the stand and start telling you these lies that he's told you - or told you yesterday? It's very simple. The defense is playing games with you. They knew and this defendant knew that the evidence in this case was strong on the issue of guilt, and there was really no point in him testifying in the first stage of the trial to convince you that he was innocent.... He knew that he couldn't convince you that he was innocent, but he thought he could plant a seed of doubt in your minds that somebody else ought to be

> punished. That's the type of person that Richard Tucker is. (T Trial 894-5)

As this Court explained in Doyle v. Ohio, 426 U.S. 610, 617 (1976), "Every post arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." Defendants have a right to remain silent, and prosecution comments construing the silence of a defendant after he is arrested violate the rights of that defendant against self-incrimination. Griffin v. California, 380 U.S. 609 (1964).

Justice Black wrote:

> I can think of no special circumstance that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privilege is largely destroyed in persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which act only under the constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the constitution. Grunewald v. United States, 353 U.S. 391, 425-6 (1957) (Black, J. Concurring).

Justice Black's argument applies with the greatest force when the penalty sought is death. Furthermore, a defendant on trial for his life has a constitutional right, based on the Eighth and Fourteenth Amendments, to offer evidence on the mitigating circumstances of his crime.

> The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor any aspect of a defendant's character or record, and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 604 (1978)

Petitioner's testimony, explaining what he considered his relatively minor role in the crime, was unquestionably relevant to mitigation.[1]

---

1. The Georgia capital sentencing statute allows for consideration of any mitigating circumstances. Ga. Code Ann. §27-2534.1 (b). It does not include a list of mitigating circumstances. Several states statutes which do include such a list specifically mention in the list that the defendant played a relatively minor role among those responsible for the crime. See, e.g., Conn. Gen. Stat. Ann. §53a-46a-f(4), Fla. Stat. §921.141 (6)(d), Miss. Code Ann. §99-19-101-6(d).

The prosecutor's comment on Petitioner's silence during the guilt/innocence phase served to penalize Petitioner, both for exercising his constitutional right to remain silent during the guilt/innocence phase of the trial, and for exercising his constitutional right to offer evidence on mitigation in the sentencing phase of the trial. If allowed in the future, such comments would deter defendants from offering evidence on mitigation, and seriously damage the safeguards required in a capital sentencing procedure permissable under the Eighth and Fourteenth Amendments.

WHEREFORE, for the reasons shown, a writ of certiorari should issue to review the judgements and opinions of the Superior Court of Butts County, Georgia.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-

RICHARD TUCKER, JR.,

Petititioner,

v.

WALTER D. ZANT, Warden
Georgia Diagnostic and
Classification Center,

Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

Application No. 1992

SUPREME COURT OF GEORGIA

ATLANTA, March 24, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Richard Tucker, Jr. v. Walter D. Zant, Warden

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

APPENDIX A

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

RICHARD TUCKER, JR.,	:	
	:	
PETITIONER	:	
	:	
VS.	:	HABEAS CORPUS
	:	FILE NO. 5019
WALTER ZANT, WARDEN,	:	
GEORGIA DIAGNOSTIC AND	:	
CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ORDER

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Bibb County. Petitioner was convicted of Murder and Kidnapping with Bodily Harm. He received two death sentences. His convictions and sentences were affirmed by the Supreme Court. Tucker v. State, 245 Ga. 68 (1980). Certiorari was denied by the Supreme Court of the United States.

The Petition, as amended, contains 42 numbered paragraphs, of which 31 allege substantive claims for relief (10-28; 31-42). Evidence and argument have been presented on only one point, however, and the Court will only address this claim for relief. All unsupported allegations will be deemed abandoned and without merit.

The record in this habeas case consists of the transcript of the proceedings before this Court on

APPENDIX B

May 29, 1981, and the transcript and record of Petitioner's trial in the Bibb County Superior Court.

I.

Petitioner claims he was denied his right under the Sixth and Fourteenth Amendments to the effective assistance of counsel.

FINDINGS OF FACT

Petitioner was represented at trial and on appeal by Robert Sikes, presently Assistant Solicitor in Bibb County. (H.T. 27). Mr. Sikes was admitted to the Bar in 1973. Id. At the time he was appointed to represent Petitioner at trial, he was engaged in private practice. Id. Though he had previously handled felony cases, this was his first capital case. (H.T. 40).

At Mr. Sikes' request, Robider Markwalter was appointed to assist Mr. Sikes. (H.T. 44). Mr. Markwalter has been in private practice for 11 years. Id. He estimated that during the first six years of his practice, 30% was in the criminal field. Id. He was experienced in capital and major felony cases. (H.T. 45).

Counsel filed numerous motions. (R. 6-25; 31-33). Both attorneys talked with Petitioner prior to trial, Mr. Sikes on at least a weekly basis, then more frequently prior to the trial of the case. (H.T. 18, 32, 45). They discussed defenses and pretrial motions with

Petitioner. (H.T. 18). Mr. Sikes met with the District Attorney and at one point discussed the possibility of a plea bargain, but the prosecutor refused. (H.T. 28, 37). Counsel had access to and reviewed the District Attorney's file and were given the State's witness list. (H.T. 28, 31, 46). They asked Petitioner for witnesses for the guilt/innocence phase of trial, but the names he gave them all appeared on the State's witness list. (H.T. 29). They interviewed the police officers, the F.B.I. agent about the fingerprint evidence, the Civil Defense Director who had found the body and pieces of evidence, and Mr. Henry who implicated Petitioner. (H.T. 31, 53). They also examined the tremendous amount of physical evidence, including the photographs introduced at trial. (H.T. 30).

Regarding defenses, Counsel tried to build a psychiatric defense, but this was quashed by the results of the psychiatric examination of Petitioner at Central State Hospital and the second evaluation by a local psychologist in Macon. (H.T. 35-36). No alibi defense was available. (H.T. 36). Petitioner had confessed; when the motion to suppress the confession was overruled, Mr. Sikes stated that "the question of a viable defense went out the window." Id.

Their strategy in the sentencing phase was to put Petitioner on the stand to evoke as much sympathy as possible. (H.T. 35). As for other witnesses in

mitigation, Petitioner virtually had no family nor community ties which could have yielded witnesses. (H.T. 9, 37, 49). Counsel did talk with Petitioner's cousin, Rosa Mae Lewis, but they decided she would not be beneficial. (H.T. 11, 37, 49).

Counsel, after looking into the matter, did not think challenging the jury was a necessary tactic. (H.T. 34). Petitioner participated in the jury-selection process. (H.T. 53). Blacks did serve on the jury. (H.T. 34, 52).

At trial, Counsel reserved his right to make an opening statement till the close of the State's case (T.T. 211); cross-examined State's witnesses (T.T. 232; 244; 257; 266; 277; 291; 332; 337; 350; 365; 371; 384; 393; 401; 416; 430; 442; 453; 456; 462; 467; 471; 474; 497; 528; 548; 560; 565; 571; 580; 620; 630; 636; 640; 651; 658; 698); gave argument during guilt/innocence phase of the trial (T.T. 724-734; 750-761); gave argument during the sentencing phase (903-915) and presented Petitioner in his own behalf. (T.T. 800).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effectice assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

APPENDIX B -4-

Petitioner's Counsel easily meets this test. Both attorneys were experienced in the trial of criminal cases. They prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and the lack of material to work with. While it may be true that Counsel put up a relatively scant defense, the finest lawyer in the country could not put up a defense that did not exist. Both attorneys appeared to be intelligent and concerned defense lawyers. The effort they put forth was certainly reasonably effective within the meaning of the standard.

That Counsel did not object to the prosecutor's mention of "parole" does not render either attorney ineffective in a constitutional sense. The Supreme Court addressed the issue of the prosecutor's remark on direct appeal. Tucker v. State, 245 Ga. at 72. Defense Counsel had introduced evidence of Petitioner's parole. Id. The Court noted that, though Counsel failed to object at the time the remark was made, Counsel "used to his advantage the fact of the prior parole by arguing to the jury that appellant would serve a full life sentence because the Board of Pardons and Paroles would not grant parole a second time." Id. Because of Counsel's curative remarks, it was not error for the trial court not to grant a mistrial on its own motion. Id. With no harmful error having been shown, the Court cannot conclude Counsel was ineffective in failing to object.

APPENDIX B

Neither was Counsel ineffective in not filing a jury challenge. Petitioner has not shown that there was anything wrong with the grand or traverse jury pools. Ergo, the Court concludes that Petitioner has not demonstrated that Counsel's decision not to file a challenge was clearly erroneous or that he was ineffective as a result of such decision. Birt v. Hopper, 245 Ga. 221, 224 (1980).

This claim for relief is found to be without merit.

WHEREFORE, all allegations in the amended Petition having been found either without merit or abandoned, the Petition, as amended, is denied.

This 11 day of Septmeber, 1981.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

APPENDIX B

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

RICHARD TUCKER, JR.,	:	
	:	
PETITIONER	:	
	:	
VS.	:	
	:	HABEAS CORPUS
WALTER D. ZANT,	:	FILE NO. 5363
WARDEN, GEORGIA	:	
DIAGNOSTIC AND	:	
CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ORDER

The Court allowed the filing of this second Habeas Corpus Petition to examine a question which was not included in Petitioner's first Petition in this Court.

The issue presented is as follows:

> Whether the admission into evidence of nonstatutory aggravating circumstances at the sentencing phase violated Petitioner's Sixth, Eighth, and Fourteenth Amendment rights under the recent decision of Henry v. Wainwright, 661 F.2d 56 (Former 5th Cir., November 12, 1981).

In Henry v. Wainwright, supra, the Court found that under Florida's death penalty statute, the admission

APPENDIX C

FILED Feb. 1 1982 at 8:00 A M
Audrey A Kelly CHIEF DEP. CLERK

of nonstatutory aggravating factors and jury instructions permitting consideration of any aggravating circumstances was constitutional error and required that Henry's death sentence be set aside.

Petitioner claims that under the rule announced in Henry, the admission into evidence of his prior convictions during the sentencing phase violated his constitutional rights.

Henry is readily distinguished from the case at hand. In Henry, the Florida Supreme Court acknowledged that "the introduction and consideration of nonstatutory aggravating factors is, under its statute, error." Henry v. Wainwright, supra, at 59.

In contrast, Georgia's death penalty statute provides for consideration at the sentencing phase of "any mitigating or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence...." Ga. Code Ann. §27-2534.1(b). This includes prior convictions and pleas of guilty, subject to notice by the State to the Defendant prior to trial. Ga. Code Ann. §27-2503; Fair v. State, 245 Ga. 868, 873-874 (1980).

The record here indicates that prior to trial Petitioner was given notice of the State's intent to introduce his prior convictions into evidence, as

well as its intent to prove four statutory aggravating circumstances. (R. 37-40).

The Court finds this claim for relief to be without merit.

Accordingly, the Petition is denied.

SO ORDERED, this 29 day of January, 1982.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

APPENDIX C

APPENDIX D

STATUTES INVOLVED

Georgia Code Annotated Section 24-4526

Appeals of Habeas Corpus After Criminal Connvictions

When Applications Granted An application to apeal a final judgement in a habeas corpus case after a criminal conviction will be granted where there is arguable merit.

Georgia Code Annotated Section 26-1101

Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manefested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Georgia Code Annotated Section 26-1311

Kidnapping (a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrent and holds such person against his will.

(b) A person over the age of 17 commits kidnapping when he forcibly, maliciously, or fraudulently leads, takes, carries away, or decoys or entices away any child under the age of 16 years against the will of the child's parents or other person having lawful custody.

A person convicted of kidnapping shall be punished by imprisonment for not less than one year or more than 20 years: Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death; and Privided that if the person kidnapped shall have received bodily injury, the person convicted shall be punished by life imprisonment or by death.

Georgia Code Annotated Section 26-3102

Capital offenses; jury verdict and sentence. Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includesa finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty.

Georgia Code Annotated Section 27-2534.1

Mitigating and aggravating circumstances; death penalty.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the followingstatutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a

substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while offender was engaged in the commisssion of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor during or because of the excercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(9) The offense of murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determinedby the trial judge to be warrented by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating

circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code Section 27-2534.1 (b) is so found, the death penalty shall not be imposed.

Georgia Code Annotated Section 50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record.

Notwithstanding the other provisions of this Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

(1) Grounds for writ.

Any person imprisoned by virtue of a sentence imposed by a State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Consitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional relinquishment or abandonment of a known right or privilege which relinquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence shows in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.

The petition shall identify the proceeding in which the petitioner was convicted, give the date of rendition of the final judgement complained of, and clearly set forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attatched. The petition shall idnetify any previous proceedings that petitioner may have taken to

secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person in his behalf.

(3) Jurisdiction and venue.

The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior courts of such counties have exclusive jurisdiction of habeas corpus actions arising under this section.

(4) Service of the petition.

Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of the petition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other authority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.

Custody and control of petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.

Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

(7) Disposition in the trial court.

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

(b) The taking of depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-127 through 81A-132 amd 81-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.

(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve the disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgement or sentencechallenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.

All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.

After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fact and conclusions of law upon which the judgement is based. Such findings of fact and conclusions of law shall be recorded as part of the record of the case.

(10) Subsequent petitions - waiver of grounds not claimed.

All grounds of relief claimed by a petitionerfor a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering the subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.

(a) Appeals in habeas corpus cases shall be governed by the Appeallate Procedure Act of 1965 [§6-701 et seq], except that as to finalorders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue of certificate of probable cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant of deny the application within a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of the proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the justice of the Supreme Court of Georgia denies the application for certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgement of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this chapter was originally imposed.

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NO. 81-6952

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RICHARD TUCKER, JR.,

Petitioner

vs.

STATE OF GEORGIA,

Respondent.

On Petition for Writ of Certiorari
To the Superior Court
of Butts County, Georgia

BRIEF FOR THE RESPONDENT IN OPPOSITION

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10

QUESTIONS PRESENTED

1. HAVE PETITIONER'S CONTENTIONS BEEN PROPERLY PRESENTED FOR REVIEW BY THIS COURT?

2. WERE PETITIONER'S CONSTITUTIONAL RIGHTS VIOLATED BY INFERENCES FROM THE EVIDENCE MADE BY THE PROSECUTOR IN HIS SENTENCING ARGUMENT?

3. WERE PETITIONER'S CONSTITUTIONAL RIGHTS VIOLATED BY THE PROSECUTOR'S COMMENT IN HIS SENTENCING ARGUMENT ON PETITIONER'S DELAY UNTIL THE SENTENCING PHASE BEFORE OFFERING EVIDENCE OF HIS INNOCENCE?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 1

A. PROCEEDINGS IN THE COURT BELOW 1

B. STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

A. PRESENTATION OF ISSUES IN LOWER COURTS 4

B. PROPRIETY OF PROSECUTOR'S SENTENCING ARGUMENT 5

C. COMMENT ON PETITIONER'S FAILURE TO PRESENT EVIDENCE 8

CONCLUSION 9

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

A. Cases

	Page
Bailey v. Ault, 229 Ga. 646 (1972)	4
Brown v. Ricketts, 233 Ga. 809 (1975)	4
Cardinale v. Louisiana, 394 U.S. 437 (1969)	5
Donnelly v. DeChristoforo, 416 U.S. 637 (1974)	6
Eagle v. Isaacs, ___ U.S. ___, 102 S.Ct. 1558 (1982)	5
Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869 (1982)	7
Henry v. Wainwright, 661 F.2d 56 (Former 5th Cir., Nov. 12, 1981)	2
Lockett v. Ohio, 438 U.S. 586 (1978)	7
Tacon v. Arizona, 410 U.S. 351 (1973)	5
Tucker v. State, 245 Ga. 68 (1980), cert. denied, 449 U.S. 891	1
Wainwright v. Sykes, 433 U.S. 72 (1977)	5
Woodson v. North Carolina, 428 U.S. 153 (1976)	7

B. Statutes

Ga. Code Ann. § 50-127(10)	4
Ga. Code Ann. § 50-127(11)	1
28 U.S.C. § 1257	5

STATEMENT OF THE CASE

A. PROCEEDINGS IN THE COURTS BELOW

On October 12, 1978, petitioner was indicted in the Bibb County, Georgia Superior Court for the murder and kidnapping of Mrs. Edna Sandefur. (Trial Record (R), 3-5). Following his jury trial, petitioner was found guilty of both offenses. (R. 46). After a sentencing trial, petitioner was sentenced to death on both charges. (R. 47-50). The Georgia Supreme Court affirmed his convictions and sentences. Tucker v. State, 245 Ga. 68 (1980), cert. denied, 449 U.S. 891. On June 20, 1980, this Court denied a petition for a writ of certiorari.

On or about March 27, 1981, Jerry A. Drayton, Jr., Esq., filed a petition for a state writ of habeas corpus in the Superior Court of Butts County, Georgia. A hearing was held on May 29, 1981. Although the petition contained 42 numbered paragraphs which made 31 substantive claims for relief, evidence and argument were presented only on the issue of effective assistance of counsel. (Sept. 11, 1981, Order of Butts Superior Court (9/11/81 OR.), 1). In its final order, the court found no violation of petitioner's Sixth and Fourteenth Amendment right to counsel and denied the petition. No appeal was taken from this order within the 30 days allowed by Georgia law. Ga. Code Ann. § 50-127(11).

On or about December 2, 1981, petitioner filed a second petition for a state writ of habeas corpus from the Butts County Superior Court. This second petition raised numerous new issues, but the court permitted the petition to be filed

for the consideration of only one issue: whether Henry v. Wainwright, 661 F.2d 56 (Former 5th Cir., Nov. 12, 1981), which had been decided since the first petition was filed, affected the constitutionality of petitioner's death sentence. (December 4, 1981, Order of Butts Superior Court). On January 29, 1982, the court found that Henry, supra, did not affect petitioner's sentence and denied the petition. (January 29, 1982, Order of Butts Superior Court). Petitioner filed a timely notice of appeal from this order. On March 24, 1982, the Georgia Supreme Court denied an application for a certificate of probable cause to appeal.

B. STATEMENT OF FACTS

The facts established at trial are adequately stated by the Georgia Supreme Court in its opinion. Tucker, supra.

SUMMARY OF ARGUMENT

Petitioner has not properly presented the issues he raises. Because he failed to raise them in his original state habeas petition, neither the Superior Court of Butts County nor the Georgia Supreme Court reached their merits.

Apart from the above question, the issues about the prosecutor's argument do not warrant this Court's attention. The statements about sexual assault were reasonable inferences from properly admitted evidence. There was no improper comment on petitioner's failure to personally testify. Moreover, petitioner waived these issues by his apparently strategic failure to object.

ARGUMENT

A. PRESENTATION OF ISSUES IN LOWER COURTS

The issues petitioner raises here about the prosecutor's sentencing argument were not raised in the Butts Superior Court until his second petition for a state writ of habeas corpus. His first petition mentioned only the prosecutor's argument about the possibility of parole and contended that petitioner's trial counsel was ineffective for not having objected to the comment. (First Pet., para. 27(B)). The other questions petitioner raises here were not even mentioned.

Under Georgia law one may not ordinarily file successive petitions for the writ of habeas corpus. It is provided in Ga. Code Ann. § 50-127(10):

> All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

Thus, according to the Georgia Supreme Court, "[A] second petition for habeas corpus shall not be allowed where the issues therein raised could have been raised in the first such petition." Brown v. Ricketts, 233 Ga. 809, 811 (1975); see also Bailey v. Ault, 229 Ga. 646 (1972). By failing to find that either of the issues raised in the petition in this Court fell within either exception to the Georgia rule against successive petitions the habeas court implicitly invoked the rule.

Petitioner's failure to properly raise the issues he now makes is a procedural default. Although this is not a federal habeas case, petitioner should be required to show actual prejudice and cause in order to overcome the waiver. Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaacs, ___ U.S. ___, 102 S.Ct. 1558 (1982). Petitioner has not suggested that either cause or prejudice exists in this case.

Moreover, these issues are not properly before this Court because due to his procedural default, petitioner, in effect, raises them here for the first time. This Court has consistently held that federal constitutional issues raised for the first time on appeal from a state court decision will not be reviewed. Cardinale v. Louisiana, 394 U.S. 437 (1969). Tacon v. Arizona, 410 U.S. 351 (1973); see also 28 U.S.C. § 1257.

Assuming that the issues have been properly presented, respondent will address their merits.

B. PROPRIETY OF PROSECUTOR'S SENTENCING ARGUMENT

Petitioner lists several statements by the district attorney made in argument during the sentencing phase of his trial, which he contends denied him certain constitutional rights. By excerpting parts of the argument, petitioner has distorted the argument. The district attorney's complete statement about the possibility of sexual assault was as follows:

> During the course of the main case there was not a great deal of evidence that you could consider about whether or not Mrs. Sandefur was sexually assaulted, but additional things have come in since that time and I think that you can

> consider the fact that she was unclothed and the fact that he says at one point she was on her knees. I think you can consider--I think you consider this history right here: On the 25th day of December, 1964, Christmas Day, Richard Tucker did unlawfully and with force and arms feloniously break and enter into the dwelling house of Catherine Jackson with intent to commit a felony, to wit: rape. I think you can consider the medium brown pubic hair that was found on his clothing, and I think in your own mind you should be settled that this Defendant not only killed Edna Sandefur--and I hate to say this with the family sitting in the courtroom because I know they don't want to believe this; they don't want to believe the type of punishment that this Defendant imposed on their mother or their wife--but I think in your own mind you should be settled now by knowing that this man is a rapist and a murderer, that he forced Mrs. Sandefur to commit acts of oral sodomy on him and that he committed the offense of rape. That's the reason she was unclothed, not this nonsense about fingerprints on clothing.

It is obvious that these statements were based on admitted evidence: A brown caucasian public hair found on petitioner's clothing (T. 627-29, 632, 639, 649); that petitioner made the victim kneel before killing her (T. 515); that she was forced to undress (T. 325-27, 370, 374, 818-19, 876); and that petitioner had previously committed a burglary with intent to rape. (T. 796-97, 847-48, 856, 861, 865). The evidence of the previous crime was, of course, admitted only during the sentencing phase. A conclusive determination as to whether there had been a sexual assault could not be made because of the advanced decomposition of the victim's body. (T. 384).

Obviously, the district attorney's inference of rape was reasonable and did not render his trial fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). That petitioner's counsel finds the inference unpleasant or strained is of no importance. It should be remembered that the Court

has repeatedly emphasized the importance of capital sentencers considering all relevant facts. See Woodson v. North Carolina, 428 U.S. 153 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869 (1982). The Georgia provision permitting the introduction of prior convictions, under which petitioner's prior conviction for burglary with intent to rape was admitted, is in keeping with the open-ended nature of capital sentencing proceedings.

Petitioner also complains of the prosecutor's statement about having viewed the decomposed body. This could not have harmed petitioner because extensive photographic and testimonial evidence of decomposition had already been admitted. (T. 372-90).

It should be pointed out that petitioner failed to object to any part of the prosecutor's sentencing argument. This failure was apparently part of his strategy: His counsel then in closing attacked the prosecution for what he thought to be overreaching. (T. 903-06). Petitioner's counsel tried to create sympathy for his client through this means. Moreover, petitioner has certainly failed to show cause and actual prejudice by virtue of the prosecutor's statements. Engle, supra.

C. COMMENT ON PETITIONER'S FAILURE TO PRESENT EVIDENCE

Petitioner contends that the district attorney improperly commented in the sentencing phase on his failure to testify in the guilt/innocence phase of his trial. For these reasons certiorari should not be granted on this issue. First, the district attorney's point was really that petitioner offered no evidence during the guilt/innocence phase (T. 720), and yet in the sentencing phase testified that he was, at best, an accomplice of the real killer. It is not a comment on the silence of a defendant to refer to his failure to offer evidence.

Second, the authority cited by petitioner has to do with the use of a criminal defendant's failure to testify in order to prove his guilt. Instant petitioner had already been found guilty when the questioned statement was made.

Third, petitioner failed to object to the statement by the prosecutor. Thus, for the reasons urged above with regard to the other comments by the district attorney, the death sentence should not be disturbed.

CONCLUSION

The instant petition should not be granted because the Supreme Court of Georgia has not "decided a federal question in a way in conflict with applicable decisions of this Court" nor do any other "special and important reasons" militate in favor of review. S. Ct. Rules 17.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 81-6952

RICHARD TUCKER, JR.,

Petitioner

vs.

STATE OF GEORGIA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

CERTIFICATE OF FILING UNDER RULE 28

I, George M. Weaver, a Member of the Bar of the Supreme Court of the United States, hereby certify and swear that I personally deposited in a United States Post Office on July 22, 1982 with first-class postage pre-paid and properly addressed to the Clerk of this Court, within the time for filing, an envelope containing the Brief for the Respondent in Opposition on the above-styled case.

George M. Weaver

GEORGE M. WEAVER

Sworn to and subscribed before me

this 22 day of July, 1982.

NOTARY PUBLIC

My Commission Expires: